Case No. 05-1593

Supreme Court, U.S.
FILED
OCT 23 2006
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

JIMMY L. ATES,
Petitioner,

v.

JAMES McDONOUGH, Secretary,
Department of Corrections, State of Florida,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITIONER'S REPLY TO STATE'S BRIEF IN OPPOSITION

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The United States Supreme Court has granted certiorari in *Lawrence v. Florida,* case no. 05-8820, which case arises from the same circuit as the petition now pending and presents the same issue presented as the petition herein, namely whether the one year statute of limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 is tolled during the pendency of a petition for writ of certiorari to the United States Supreme Court.

Petitioner Ates has argued that the conflicts among the circuits must now be addressed and resolved by the Supreme Court of the United States. A brief legal history is illustrative.

In *Rhine v. Boone,* 182 F.3d 1153 (10th Cir.1999), the Tenth Circuit was faced with the issue of whether the actual filing of a petition for a writ of certiorari in the United States Supreme Court following the denial of collateral relief in the state courts tolled the running of the statute of limitations. The Tenth Circuit looked to the language of 28 U.S.C. § 2244(d)(2), which is the provision applicable to tolling during state collateral proceedings, and contrasted it with the language of section 2244(d)(1), which is the provision applicable to tolling during direct appeal. *Id.* at 1155-56. and concluded the one-year time limitation did not include the additional ninety days to petition the United States Supreme Court on federal habeas petitions filed by state prisoners. *Rhine v. Boone, supra*, 182 F.3d at 11555-56.

The Fifth Circuit reached the same conclusion on this

issue as did the Tenth Circuit, and for the same reasons. *See Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir.1999). The Eleventh Circuit agreed with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, was not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes. *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000); *Lawrence v. State of Florida,* 421 F.3d 1221 (11th Cir. 2005), certiorari granted --- U.S. ---, 126 S.Ct. 1625 (Case No. 05-8820).

A related issue addressed by several circuits is whether actual petitioning for certiorari on the underlying conviction is required in order to extend the one year limitations period. *Clay v. United States*, 123 S. Ct. 1072, 1075, 537 U.S. 522, 155 L. Ed. 2d 88 (2003), offers a compelling logic. In *Clay*, the Court determined that a federal criminal conviction becomes final, for the purposes of calculating the one-year time period within which to move to vacate pursuant to 28 U.S.C. § 2255

when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction.

The Tenth Circuit has concluded, however, that section 2244(d)(2) does not toll the limitations period where the petitioner had actually sought certiorari in the Supreme Court. *Rhine*, 182 F.3d at 1156. The Fourth Circuit agreed where the petitioner had actually sought certiorari. *Crawley v. Catoe*, 257 F.3d 395, 399-400 (4th Cir. 2001). Other circuits, relying on *Rhine*, have reached the same conclusion with respect to petitioners who had not actually sought certiorari review. *See Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001); *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001); *Coates v. Byrd*, 211 F.3d 1225, 1227(11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *see also Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000).

The Third Circuit has also distinguished situations where certiorari is actually sought from those where it is not. In particular, in 1999, the Third Circuit concluded th... the

limitations period was tolled during the period where a petitioner actually sought certiorari. *See Morris v. Horn*, 187 F.3d 333, 336-37 (3d Cir. 1999). However, subsequent to the decision in *Morris*, the Third Circuit concluded that the ninety-day period for seeking certiorari review in the Supreme Court should not be considered to toll the limitations period under section 2244(d)(2) where the petitioner has not actually sought certiorari. *See Nara v. Frank*, 264 F.3d 310, 318 & n.4 (3d Cir. 2001); *Stokes v. Dist. Attorney of the County of Phila.*, 247 F.3d 539 (3rd Cir. 2001). The distinction relied on the use of the word "pending" in section 2244(d)(2), concluding that where no petition for certiorari is actually filed, nothing can be "pending" under section 2244(d)(2). *Nara*, 264 F.3d at 318. Recently, however, the Third Circuit abandoned this distinction altogether, joining the majority of the circuits. *See Miller v. Dragovich*, 311 F.3d 574 (3d Cir. 2002). The court said, "To avoid *Duncan* we would have to hold that Congress intended to distinguish between the exercise of Supreme Court certiorari

jurisdiction and federal habeas corpus jurisdiction in enacting section 2244(d)(2)." *Id.* at 579.

The Second and Seventh Circuits adopted a narrow version of the approach taken in *Isham*, *Coates*, *Ott*, *Miller*, and *Rhine*, limiting their holdings to a rule that the period during which certiorari may be sought cannot toll the limitations period where certiorari is not actually sought. *See Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001). The Seventh Circuit focused on whether there was any "properly filed" application where the petitioner had not sought certiorari to the United States Supreme Court, concluding that where nothing had been filed, nothing could be "properly filed" under section 2244(d)(2). *Gutierrez*, 233 F.3d at 492. The Seventh Circuit also concluded that where no petition for certiorari had been filed, nothing could be "pending" under section 2244(d)(2). *Id.* Ultimately, however, the Seventh Circuit declined to address whether "State post-conviction" review or "other state collateral

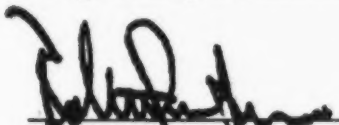
review" may include a "properly filed," "pending" petition for certiorari to the United States Supreme Court. *Id.*

The Second Circuit, likewise faced with a situation where the petitioner had not sought certiorari, adopted the reasoning of the Seventh Circuit, stating, "Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed." *Smaldone*, 273 F.3d at 138. The Second and Seventh Circuits continue to distinguish between situations in which a petition for certiorari review of the denial of state habeas relief is actually sought and those cases where it is not.

The circuits need a bright light line definitive resolution of these important questions. The instant petition is not a capital case. The instant petition does not include claims of equitable tolling. *Cf. Lawrence v. Florida, supra.* For reasons stated, it is respectfully submitted the instant petition falls within the category of cases involved in *Lawrence*, presently pending before the Court, with a more streamlined procedural

history. Certiorari review by the Court is necessary to resolve this important legal question which is capable of being oft repeated, and which has split the circuits. All appropriate relief is hereby requested.

Respectfully submitted,



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